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No. 80-1927

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEE R. CUNNINGHAM,

Petitioner,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the affirmance of a jury verdict in an FELA case where the petitioner not only fails to argue that the court of appeals' decision either conflicts with any other court's decision or otherwise raises an issue justifying review under SUP. CT. R. 17.1, but also does not even properly assert that any legal rulings were erroneous.

2. Whether the court of appeals sanctioned a departure from the usual and accepted practice when it held that the district court did not abuse its discretion in denying petitioner's motion for a new trial.

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SUMMARY OF ARGUMENT

Petitioner does not even purport to present to this Court any issue that justifies review. Instead, he attempts to disguise and reargue his sufficiency of the evidence contention, a contention which the court of appeals held both had been improperly presented to the district court and was without merit. At bottom, petitioner is unhappy that the jury disagreed with his view of the evidence.

In an altogether unremarkable order, the court of appeals held that by failing to move for a directed verdict or for

judgment notwithstanding the verdict, petitioner failed to preserve for review his sufficiency of the evidence claim. It also held that on the evidence presented to the jury, the jury could have reasonably determined that respondent was not negligent. Accordingly, it held that the district court's refusal to grant petitioner's motion for a new trial was not an abuse of discretion. None of these holdings is improper. None of these holdings is worthy of review by this Court.

ARGUMENT

1. *Petitioner Does Not Purport to Raise an Issue Worthy of Review.* Nowhere in his petition for certiorari does petitioner purport to raise an issue worthy of this Court's review. He does not contend that the court of appeals' decision conflicts with that of any other appellate court, sanctions a departure from the accepted and usual course of judicial proceedings, or decides an important, unsettled question of federal law. *See,* SUP. CT. R. 17.1. Indeed, there is nothing in the petition indicating any important issue arises from the court of appeals' order.

Instead, petitioner reasserts the basically factual arguments he made to the appellate court. While he purports to cast his first issue as an issue of law, he does not contend that the jury was improperly instructed or that any court made any legal error. His argument is that on his view of the evidence, respondent was negligent and the worst the jury could have done was to find that petitioner was contributorily negligent, a finding that could diminish, but not entirely bar recovery under 45 U.S.C. § 53 (1976). *See,* Petition at 17. Similarly, given petitioner's view of the evidence, the jury must have disregarded the district court's Instruction 10. *See,* Petition at 14.

Petitioner's argument is a sufficiency of the evidence argument which the court of appeals properly held had been waived by petitioner's failure to move for a directed verdict or a judgment notwithstanding the verdict. *See,* Petition A-2, A-3. The court of appeals' holding is consistent both with other courts' decisions in FELA cases and in general. *See, e.g., Owens* v. *Atchison, Topeka and Santa Fe R. Co.,* 393 F.2d 77, 78 (5th Cir.) (per curiam, *cert. denied,* 393 U.S. 855 (1968); *International Business Machines Corp.* v. *Catamore Enterprises, Inc.,* 548 F.2d 1065 (1st Cir.), *cert. denied,* 431 U.S. 960 (1976). Petitioner does not contend otherwise.

Respondent submits that this Court should refrain from granting certiorari in a case where petitioner not only failed to preserve his sole "legal" issue for appeal, but also failed to challenge the court of appeals' holding that no legal issue was properly preserved.

2. *By Holding That the District Court Had Not Abused Its Discretion in Denying His Motion for New Trial, the Court of Appeals Did Not Sanction a Departure from the Usual and Accepted Practice.* Petitioner argues that the weight of the evidence was against the jury's verdict in contending that he should have been granted a new trial. *See,* Petition at 20. Although he neither argues that the court of appeals applied an incorrect legal standard in reviewing the district court's denial of his motion for new trial, nor points to any specific error in the appellate court's legal and factual analysis, petitioner nonetheless asserts that the jury's verdict was erroneous.

The court of appeals properly applied an abuse of discretion standard in reviewing the district court's denial of petitioner's new trial motion. *See,* Petition at A-3; *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 247-48 (1940). In applying that standard, it found that there was evidence which demonstrated that petitioner had been instructed at a company meeting and through a company rule on the proper way to lift objects and that employees were usually available to help him. In short, the court of appeals found that a jury reasonably could have concluded that respondent was not negligent at all with respect to petitioner, and that petitioner's injury was solely his own fault. It therefore held there was no abuse of discretion by the district court.

Petitioner has not challenged the court of appeals' factual analysis by any record citation, or otherwise, sufficient to demonstrate it was erroneous. Nor has he challenged the standard the appellate court used in reviewing the district court. Rather, with one exception, he has cited to this Court cases in which issues under the FELA were held to have

been properly submitted to a jury. See, Petition at pp. 20-22. Thus, for example, in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957), this Court reversed a court of appeals and reinstated the jury's verdict in an FELA case. *See also, Gallick* v. *Baltimore and Ohio R.R. Co.*, 372 U.S. 108 (1963) (reversing state appellate court and reinstating jury verdict); *Webb* v. *Illinois Central Railroad Co.*, 352 U.S. 512 (1957) (reversing appellate court and reinstating jury verdict); *Tennant* v. *Peoria and Pekin Union Railway Co.*, 321 U.S. 29, *reh. denied*, 321 U.S. 802 (1944) (reversing appellate court and reinstating jury verdict); *Blair* v. *Baltimore and O. R.R.*, 323 U.S. 600 (1945) (holding evidence was sufficient to go to the jury and reversing appellate court); *Eggert* v. *Norfolk & W. Ry. Co.*, 538 F.2d 509 (2d Cir. 1976) (reversing directed verdict); and *Rodriguez* v. *Delray Connecting Railroad*, 473 F.2d 819 (6th Cir. 1973) (affirming jury verdict). Ironically, the one case cited by petitioner in which the FELA issues were held properly not sent to a jury involved a directed verdict for the defendant railroad. *Deere* v. *Southern Pacific Co.*, 123 F.2d 438 (9th Cir. 1941), *cert. denied*, 315 U.S. 819 (1942).

As in the cases petitioner cites as precedent, this case was submitted to the jury. In short, petitioner got his wish. Petitioner simply challenges the fact that he was unable to convince the jury that respondent was liable. That he received an adverse result from a jury does not warrant this Court's grant of certiorari.

CONCLUSION

The court of appeals' decision affirming the district court's judgment on the jury verdict and denial of petitioner's motion for new trial was correct and consistent with all existing authority. That petitioner lost before a

jury in an FELA case simply does not justify review by this Court. Petitioner failed properly to preserve any legal issue and raised no factual issue of any import. Respondent submits under these circumstances this Court should not issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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